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No. 94-1900

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
Petitioner,

v.

BELL ATLANTIC CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONER

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Bell Atlantic agrees with our contention that this Court should grant the petition for certiorari from the judgment of the Fourth Circuit. It vigorously urges the Court, however, not to adopt the suggestion that, upon granting the petition, the Court remand the case to afford the Fourth Circuit the opportunity to give full consideration to an important development post-dating the court of appeals' decision: the Commission's adoption, by formal rulemaking, of a construction of Section 533(b) that transforms the terms of the question decided by the Fourth Circuit. While plenary review of the case at this stage certainly would be appropriate, Bell Atlantic has failed to show that a remand is not the more sensible and appropriate course.

There can be no doubt that the new Commission construction radically changes the issue actually decided by the court of appeals. In its central description of the Fourth Circuit's ruling, Bell Atlantic pinpoints the construction of Section 533(b) that formed the premise for the holding of invalidity: " '[t]he First Amendment problem with § 533(b) is that the provision does not allow the telephone companies to engage in protected speech, that is, the provision, with editorial control, of cable television services.' " Br. in Resp. 4, quoting 94-1893 Pet. App. 15a n.10 (emphasis deleted by respondents). *See also* Br. in Resp. 1 ("47 U.S.C. § 533(b) . . . bars local telephone companies from providing video programming directly to subscribers in their telephone service areas"). What the Commission decided in the recently completed rulemaking, however, was that Section 533(b) does not in fact have that effect. Under the Commission's construction of the whole of Section 533(b), including the waiver provision of paragraph (4), the statute *allows* local telephone companies "to engage in protected speech, that is, the provision, with editorial control, of cable television services" in their telephone service areas. The explicit premise of the Fourth Circuit's holding has been eliminated by the Commission's rulemaking since the time the Fourth Circuit ruled (and denied rehearing).[1]

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[1] Bell Atlantic overstates the effect of Section 533(b), even aside from paragraph (4), when it excerpts a quote from an affidavit and asserts that the statute "excludes telephone companies from what is undisputedly 'the most important mass medium in America.' " Br. in Resp. 9 (quoting Affidavit of William Lee, Ct. App. JA 141). What the quoted affidavit says, however, is that "*video communication* is the most important mass medium in America." (emphasis added). Bell Atlantic, which (among other things) has entered the wireless cable business and may become a broadcaster, plainly is not excluded from video communication, any more than are broadcasters (who likewise are subject to cable cross-ownership restrictions). *See* Pet. 9, 27.

A remand to the Fourth Circuit would allow the court to address this issue-altering development. It also would, consistent with this Court's normal certiorari policy, provide the benefit of at least one lower-court ruling on a question presented for decision—here, the essential threshold question of statutory construction. And the expenditure of this Court's resources may be rendered entirely unnecessary by the Fourth Circuit's action on remand or, possibly, by legislation replacing Section 533(b) that is now making its way through Congress.

Bell Atlantic intimates that a remand would be futile, pointing to several places in the parties' papers in the lower courts where Section 533(b)(4) was cited or discussed. Br. in Resp. 16-20. This suggestion takes an unrealistic view of the course of proceedings. The Fourth Circuit *could not* have considered the Commission's new formal rule on the proper construction of Section 533(b)(4), which was not even proposed until two days after the Fourth Circuit's last action in the case—denial of rehearing. Moreover, the Fourth Circuit was not presented with any developed argument for a "saving construction" of Section 533(b)(4) prior to its decision; never received *any* presentation on the issue from the Commission, the agency charged with administering the statute; and plainly misread Section 533(b)(4) in its only mention of the provision in its opinion. *See* Pet. 15-16, 22. The Fourth Circuit realistically would have something new and important to consider upon remand.

A remand in these circumstances would be in keeping with *Bureau of Economic Analysis v. Long*, 454 U.S. 934 (1981), where an "intervening Act of Congress changed the substantive law applied by the Court of Appeals." Br. in Resp. 13 n.16. The Commission's formal rulemaking, subsequent to the Fourth Circuit's decision and rehearing denial, effects an equivalent change in the applicable law under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837

(1984).[2] A remand would also be consistent with this Court's actions remanding for reconsideration even when a change in statutory construction is advanced by the government simply as a litigant. *See, e.g., Knox v. United States*, 114 S. Ct. 375 (1993). Bell Atlantic identifies no case indicating that a remand would be inappropriate in the present circumstance. The issue is simply one of prudent administration in the ordering of judicial consideration of important legal issues on their merits.[3] A remand in this case, to give the Fourth Circuit a full opportunity to consider the serious issue raised by the Commission's construction of Section 533(b)(4), makes good sense.

Bell Atlantic seeks to discount the seriousness of the issue by putting itself in the odd posture of objecting to the Commission's narrowing construction of Section 533(b), a construction that would allow Bell Atlantic to do what its challenge says Section 533(b) forbids: *i.e.*, provide in-region wire-based video programming to subscribers. It turns established principles on their head to seek to broaden rather than narrow statutory restrictions on speech so as to invite rather than avoid a constitutional invalidation of an Act of Congress. Bell Atlantic's several objections to the Commission's construction all have ready answers, made compelling against the backdrop of the demand to save rather than condemn federal statutes. *See, e.g.*, Pet. 18-21; Pet. App. 117a-121a. In any event, it would be appropriate that these arguments initially be presented (as they have not been to date) to the Fourth Circuit.

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[2] No such situation was presented, of course, in *United States v. X-Citement Video, Inc.*, 115 S. Ct. 464 (1994), or the other cases noted in footnote 17 of Bell Atlantic's response.

[3] The principles governing vacatur of a lower-court judgment upon mootness of a case, where the judgment cannot be reentered and no review of the merits will ever be had in the case, are irrelevant to the issue. *See* Br. in Resp. 14-15 (relying on *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386 (1994)).

CONCLUSION

The petition for a writ of certiorari should be granted and the case either remanded for reconsideration by the Fourth Circuit or set for plenary briefing and argument.

Respectfully submitted,

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